NO. 98-11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHIGAN,

Petitioner,

v.

MARKEE BAILEY,

Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF THE CASE

Relevant Procedural History

After his pre-trial motion to suppress the evidence was denied, the Respondent, Markee Bailey, was convicted of possession of marijuana with intent to distribute after a jury trial in the Genesee County (Michigan) Circuit Court. Mr. Bailey, who possessed one-half ounce of marijuana, was sentenced to imprisonment for 4 to 8 years.

On December 12, 1997, the Michigan Court of Appeals reversed Mr. Bailey's conviction in an unpublished opinion. The Michigan Court of Appeals held that all of the evidence had been seized during an investigative stop for which the police officers had no articulable or reasonable suspicion.

On January 30, 1998, the Petitioner filed an untimely application for leave to appeal in the Michigan Supreme Court. On March 31, 1998, the Michigan Supreme Court unanimously denied the Petitioner's application for failure to persuade the court that the questions presented should be reviewed.

On June 29, 1998, this Court docketed the Petition for a Writ of Certiorari.

Relevant Facts

The facts are undisputed. On July 29, 1993, two police officers arrested Mr. Bailey and five other men who were sitting in a legally-parked van in broad daylight in the parking lot of a city park in Flint, Michigan. After seeing "suspicious movement" from the occupants of the van, the officers approached the van with guns drawn and ordered Mr. Bailey to raise his hands,

produce identification, and get out of the van. In the process of exiting the van, Mr. Bailey dropped a bag containing approximately one-half ounce of marijuana. A search of the van and its occupants revealed that the six occupants of the van, including Mr. Bailey, possessed a grand total of three-quarters of an ounce of marijuana.

Mr. Bailey filed a motion to suppress the evidence seized from his person and from his van. At the evidentiary hearing, the parties and the trial court agreed to use, as the record for the motion, the transcript of Officer Cedric Kendall's testimony from Mr. Bailey's preliminary examination.

Officer Kendall testified that as he was preparing to arrest a man standing in the park with an open liquor bottle, he noticed a van parked in the parking lot. As he approached the van, he noticed Mr. Bailey, who was in the driver's seat, "moving around inside of the van as if he was hiding something either under the seat or somewhere about his body." Officer Kendall then approached Mr. Bailey and, with his gun drawn, demanded that Mr. Bailey produce identification and put his hands up. Officer Kendall noticed that Mr. Bailey was stuffing something under his right leg. Officer Kendall then ordered Mr. Bailey out of the van. As Mr. Bailey exited the van, he dropped a small bag containing the marijuana.

At the suppression hearing, Mr. Bailey argued that the initial encounter was illegal because suspicious movements alone do not amount to an articulable suspicion of criminal activity. The trial court denied the motion, ruling that Officer Kendall could seize Mr. Bailey because of the "very unusual circumstances of movement" in the van.

I. THIS COURT SHOULD DENY CERTIORARI SINCE THE PETITIONER HAS NOT IDENTIFIED AN ISSUE WORTHY OF REVIEW AND SINCE THE STATE APPELLATE COURT'S DECISION IS CORRECT.

Mr. Bailey respectfully requests that this Court deny the Petition for a Writ of Certiorari for two reasons. First, the Petitioner has not attempted to identify any issue on which state or lower federal courts have conflicted or any unsettled issue that ought to be settled by this Court. *See* S. Ct. R. 10. Instead, the Petitioner has expressed its disagreement with the Michigan Court of Appeals' application of the law to the facts of this case. Therefore, the Petitioner has failed to articulate a reason for the exercise of this Court's jurisdiction. *Id.*

Second, the Michigan Court of Appeals' decision was a correct application of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Sibron v. New York*, 392 U.S. 40 (1968), to the facts of this case. The Petitioner concedes that the initial encounter between Officer Kendall and Mr. Bailey was a *Terry* stop. Petition at 7-8. That concession is appropriate, as Officer Kendall testified that he approached the parked van, he had his gun drawn, he ordered Mr. Bailey to put his hands up, and he demanded that Mr. Bailey produce identification. Mr. Bailey was seized as he was certainly not free to decline the encounter with Officer Kendall. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) (seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen").

In order to justify the *Terry* stop, the Petitioner must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* at 21. That is, the Petitioner must identify specific and articulable facts amounting to reasonable suspicion. *See Sibron* at 66. As this Court explained in *Terry*, this

standard is not satisfied by an officer's "inchoate or unparticularized suspicion or 'hunch'," but by "specific reasonable inferences which he is entitled to draw from the facts in light of his experiences." *Terry* at 27.

The Michigan Court of Appeals held that there was no such reasonable suspicion here:

> Considering the totality of the circumstances with which the police were confronted before they requested that defendant raise his hands, it is clear that on the basis of what they had observed, the officers had no articulable or particularized grounds to reasonably suspect that defendant was, had been, or was about to be engaged in criminal activity. Here, the plain clothed officers' observations which formed the basis of their particularized suspicion are clear; their observation of a van with several occupants inside legally parked in broad daylight in an area known for drug activity; and their observation of defendant making suspicious movements as if he was attempting to hide something. . . . The record in this case is devoid of any reference to other specific facts which would cast a suspicious light on defendant's "suspicious movements" or the presence of his van in the parking lot.

People v. Bailey, No. 199473 (Mich. App. 1997) (5a-6a).

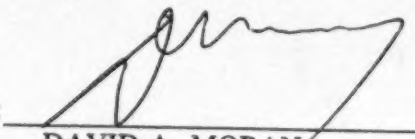
In short, the police in this case had nothing more than a "hunch" at the point that Officer Kendall, with weapon drawn, ordered Mr. Bailey to produce identification and put his hands up. The police had no specific or articulable facts that would justify the conclusion that any crime was occurring, much less any particular crime. The Michigan Court of Appeals was correct, therefore, to reverse the trial court's denial of Mr. Bailey's motion to suppress.

CONCLUSION

Therefore, Respondent Markee Bailey respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

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